

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(South San Francisco, California)

APRIA HEALTHCARE GROUP, INC. 1/

Employer

and

SANITARY TRUCK DRIVERS AND HELPERS
LOCAL UNION NO. 350, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS 2/

Petitioner

20-RC-17863**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 4/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 6/

All full-time and regular part-time clinical service technicians, patient service technicians, delivery technicians, delivery technician loaders, transportation leads, warehouse clerks and senior warehouse clerks employed by the Employer at its South San Francisco, California facility; excluding all other employees, respiratory therapists, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION 7/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are

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employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **SANITARY TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 350, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB. Wyman-Gordan Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before **May 30, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **June 6, 2003**.

Dated May 23, 2003.

at San Francisco, California

/s/ Timothy Peck
Acting Regional Director, Region 20

- 1/ The Employer's name appears as amended at the hearing.
- 2/ The Petitioner's name appears as amended at the hearing.
- 3/ The parties stipulated, and I find, that the Employer is a Delaware corporation with an office and place of business in South San Francisco, California, where it is engaged in the retail and non-retail provision of home-health care services and the distribution of healthcare products to individuals and hospitals. The parties further stipulated, and I find, that during the 12-month period ending April 30, 2003, the Employer purchased and received at its South San Francisco facility goods valued in excess of \$50,000 directly from suppliers located outside the State of California. Based on the parties' stipulation to such facts, I conclude that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.
- 4/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 5/ The parties stipulated, and I find, that there is no contract bar to this proceeding.
- 6/ The Petitioner seeks to represent a unit comprised of all full-time and regular part-time drivers and warehousemen employed by the Employer at its South San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act. The petitioned-for unit consists of approximately 13 employees, including three patient service technicians, two delivery technicians, one delivery technician loader, three clinical service technicians, two transportation leads, one warehouse clerk and one senior warehouse clerk.

The Employer asserts that to be appropriate, the unit must also include employees in the classifications of lead respiratory therapist, senior respiratory therapist and respiratory therapist. The Petitioner takes the contrary view. As of the date of the hearing, there were four employees in these classifications: one lead respiratory therapist, two senior respiratory therapists and one respiratory therapist.

Facts. The Employer delivers oxygen and durable medical equipment and supplies to home-care patients, nursing homes, and hospitals. It is headed by Branch Manager Jose Cipriano Lucero. The Employer's operations consist of several departments, including a customer service department, a logistics department and a respiratory therapy department. All of the petitioned-for employees work in the logistics department.

Customer Service Department. This department is headed by the customer service manager/supervisor and consists of a receptionist and 15 to 17 customer service representatives, some of whom take customer orders by phone and others of whom verify patient coverage, confirm deliveries of products to patients and handle patient medical records and prescriptions. The parties do not dispute the exclusion of the customer service employees from the unit.

The Logistics Department. As noted above, at the time of the hearing, the Employer's logistics department consisted of two delivery technicians, one delivery technician loader, three patient service technicians, three clinical service technicians, a senior warehouse clerk and one warehouse clerk. The logistics supervisor position, formerly held by Mario Bonilla, was vacant as Bonilla stepped down from that position in April 2003 to become a customer service technician. Thus, at the time of the hearing, the logistics department employees were reporting directly to Branch Manager Lucero. The record does not indicate when or if the vacant logistics supervisor position will be filled.

The Clinical Service Technicians. The three clinical service technicians drive liquid oxygen tanker trucks as do the patient service technicians and employees in both classifications must possess a Class B (commercial) driver's license with a HAZMAT endorsement. The clinical service technicians spend 90 to 95% of their time handling initial delivery and set up of equipment for customers. The other 5% of their time is spent delivering refills for oxygen tanks like the patient service technicians. Unlike the patient service technicians, the clinical service technicians do not have regular routes. Instead, they receive new work orders to set up equipment on a daily basis.

The clinical service technicians earn about \$17 an hour and, except as noted above, receive the same fringe benefits as other employees.

The Patient Service Technicians. The three patient service technicians deliver and dispense oxygen to patients from liquid oxygen tanker trucks. They also deliver durable medical equipment to patients. As indicated above, the patient service technicians must possess a Class B (commercial) driver's license with a tanker truck and hazardous materials (HAZMAT) endorsement.

The patient service technicians have regular routes delivering oxygen to patients. They spend 90 to 95% of their time performing duties related to refilling oxygen tanks. In performing this task, the patient service technicians remove oxygen tanks from the patient's home, refill the tanks from their truck and return the tanks to the patient's home. The other 5% of their time is spent doing the initial set up of equipment for customers and/or delivering

other durable medical equipment to patients. There is no evidence that the patient service technicians make medical judgments about patients in the course of their work.

When patient service technicians set up equipment, they fill out a packet of information indicating the type of equipment being set up; the equipment readings; the serial numbers of the equipment; and they note if they give any training on the equipment to the patient. The patient service technicians also complete progress notes, which are placed in patient medical charts maintained by the Employer. Included in these reports are any observations they make as to whether a patient is underfed or abused, or that a patient or family member is smoking because this can present a fire hazard with oxygen use. Under State law, the patient service technicians and all other employees who come into contact with patients are required to report signs of patient abuse. The progress notes and reports prepared by the patient service technicians are given to their supervisor and/or to the respiratory therapists to follow up on and/or to place in the patient's medical records.

In addition to seeking drivers who possess a Class B (commercial) driver's license with tanker truck and HAZMAT endorsements for the patient and clinical service technician positions, the Employer also seeks individuals who have experience and a good driving record for its clinical service technician and patient service technician positions. Patient service technicians and clinical service technicians are trained on the job about the equipment that they deliver; how to set up equipment; and how to fill out Department of Transportation (DOT) forms and route sheets. Pursuant to Federal law, individuals in both classifications are subject to drug testing when hired and are tested periodically thereafter. The clinical service technicians and patient service technicians carry radios enabling them to contact the Employer's dispatch office. Typically, patient service technicians and clinical service technicians spend a few weeks training on-the-job by riding along with other employees before they are assigned to their own routes. Their training also includes watching videos to teach them about the equipment they are delivering and/or setting up.

Both patient service technicians and clinical service technicians are occasionally called upon to assist walk-in/unscheduled patients who come to the Employer's facility to purchase or rent equipment.

Patient service technicians earn approximately \$16 an hour and except as noted above, receive the same fringe benefits as all other employees.

The Delivery Technicians and Delivery Technician Loader. The delivery technicians deliver equipment such as commodes, wheelchairs, walkers to patients. No training is required for the delivery technician and delivery technician loader positions. The three delivery technicians drive vans supplied

by the Employer. They are not required to have a commercial driver's license. The delivery technician loader works in the warehouse loading trucks and handles most of the loading of the trucks driven by the patient service technicians and the clinical service technicians. The delivery technicians, patient service technicians, clinical service technicians and respiratory therapists also load and unload their own vehicles, retrieving the equipment that they need from the warehouse and returning used equipment to the cleaning area in the warehouse to be disinfected and repaired. When the delivery technician loader is not present, the warehouse clerk and senior warehouse clerk also help to load equipment and products for delivery.

The delivery technician and delivery technician loader positions are basic entry-level positions for new employees hired by the Employer who do not possess a Class B (commercial) driver's license. The delivery technicians and the delivery technician loader earn approximately \$15 an hour. All of the Employer's employees receive the same fringe benefits except that the logistics department employees who drive and deliver products (i.e., the delivery technicians, delivery technician loader, clinical service technicians, patient service technicians, transportation lead and warehouse employees) participate in a driver incentive program that is not available to the respiratory therapists. This program provides bonuses to these employees if they maintain good driving records.

Transportation Leads. There are two transportation leads. They are both trained and experienced in delivery technician, patient service technician and clinical service technician work. The transportation leads are not licensed as respiratory therapists and do not substitute for the respiratory therapists. One of the two transportation leads works as a dispatcher while the other makes deliveries. These duties are rotated between the two men each week. The transportation leads do not dispatch the respiratory therapists. Rather, they are dispatched by the lead respiratory therapist. Branch Manager Lucero testified that he uses the transportation leads as a go-between with the other logistics department employees for such matters as submitting time off requests. Logistics department employees submit time off requests to the transportation leads who then give them to Lucero to decide and to schedule. According to Lucero, the transportation leads are not allowed to make scheduling decisions. They earn approximately \$18 an hour.

Warehouse Clerk. The warehouse clerk maintains and cleans the Employer's inventory. He also assists in the loading and unloading of trucks when the delivery technician loader is not available and substitutes for the delivery technicians in making deliveries. The warehouse clerk does not possess a class B (commercial) drivers license and does not drive liquid oxygen trucks. He earns approximately \$15 an hour.

The Senior Warehouse Clerk. In addition to handling the same functions as the warehouse clerk described above, the senior warehouse clerk orders equipment and inputs it into the computer when it is delivered. He also substitutes for the transportation lead in dispatching logistics department employees. The senior warehouse clerk possesses an MDR (medical device retailer) license that enables him to access certain FDA regulated products maintained by the Employer in a locked cage. The branch manager and two of the respiratory therapists also possess MDR licenses. The senior warehouse clerk earns approximately \$19 an hour.

The Respiratory Department. The Employer's respiratory department consists of one respiratory therapist, two senior respiratory therapists and the lead respiratory therapist. All of the respiratory therapists report directly to Branch Manager Lucero. There is no supervisory position between the respiratory therapists and Lucero.

The Respiratory Therapists. All respiratory therapists must have an AA degree in respiratory therapy from an accredited institution and be licensed by the State of California. They must pass a State examination in order to be licensed.

The respiratory therapists set up and monitor equipment and train patients and caregivers in how to use the equipment and how to set up certain equipment. This training is conducted at the Employer's facility and in patients' homes, nursing homes and hospitals. Certain of the equipment that the respiratory therapists set up is of a type that only they are licensed to set up. This equipment includes ventilators (breathing machines), CPAP (apnea monitors), BIPAPs, phototherapy and oximeters. In hiring respiratory therapists, the Employer seeks persons who are licensed, who have field experience, and have no criminal record.

The respiratory therapists have their own office at the Employer's facility. They drive their own vehicles and receive a vehicle allowance and mileage reimbursement from the Employer. The respiratory therapists transport equipment in their vehicles and maintain components and supplies for such equipment, such as nebulizers, masks, tubings and filters, in their vehicles. In carrying out their duties, the respiratory therapists use their own cell phones rather than the Employer supplied radios used by the delivery technicians, clinical service technicians and patient service technicians. The respiratory therapists do paperwork, which includes noting/describing the instructions they have given to the family; how the equipment is functioning; the results of tests run on the equipment; and the serial numbers on the equipment. The respiratory therapists also write medical progress reports that go into the patients' medical files maintained in the Employer's Sacramento office and in the respiratory therapist's office at the Employer's South San Francisco facility. The respiratory therapists do not fill out the driver's logs and DOT forms required of the delivery, clinical service, and patient service technicians. The respiratory therapists also

do follow-up visits with patients and at times schedules visits with patients at the Employer's facility. The lead respiratory therapist handles the scheduling of appointments by the respiratory therapists.

The respiratory therapists hold their own separate meetings to discuss patients, equipment and policies. The branch manager also calls meetings attended only by the respiratory therapists. The record reflects that while the respiratory therapists use the same timeclock as other employees, they may schedule appointments prior to coming to work and fill out time sheets in lieu of punching the timeclock. Logistics department employees are not allowed to do this. The respiratory therapists are away from the Employer's facility visiting patients and setting up equipment most of the day and do not eat in the lunchroom at the Employer's facility.

The record reflects that at the time of the hearing, one respiratory therapist was working 40 hours a week; one was working 32 hours a week; one was working 24 hours a week; and one was working per diem. The per diem respiratory therapist works on average about 3 or 4 days a week but had not worked for the month prior to the hearing. The respiratory therapists earn between \$26 and \$29 an hour. The respiratory therapists receive the same benefits as other employees except as noted above. Their vacation scheduling is handled separately from the scheduling for the employees in the logistics department.

The Lead Respiratory Therapist. Branch Manager Lucero testified that Lead Respiratory Therapist, Janet Melendrez, is more experienced and knowledgeable than the other respiratory therapists. According to Lucero, Melendrez advises and directs the other respiratory therapists in their work and reports disciplinary problems to him for decision-making. Melendrez also schedules the visits by the respiratory therapists to patients' homes with input from Lucero but Lucero testified that Melendrez is also authorized to do this without his input as necessary. Lucero must approve all overtime. The respiratory therapists submit their vacation requests and sick leave requests to Melendrez and she and Lucero decide whether to grant them.

The record reflects that Melendrez has the authority to authorize time off for the respiratory therapists on an emergency basis. According to Lucero, this has happened only on one occasion. On this occasion, Melendrez authorized a sick employee to go home when Lucero was not present.

Contacts and Interchange. The record reflects that several of the clinical service technicians, including Tim Collins, Alonso Diaz, Humberto Espinosa and Mario Bonillo, previously worked as patient service technicians. However, none of the respiratory therapists have ever worked in any other classification and none of

the employees in the other classifications have worked as respiratory therapists. There is no evidence that the respiratory therapists temporarily transfer or substitute for other employees or vice versa.

The Employer's Director of Employee Relations and Risk Management, Kathy Klein, testified that the Employer has 420 branch offices. According to Klein, the Employer has a tuition reimbursement program and posts open positions at all of its locations. Klein testified that many clinical service technicians at other locations have used that program to become respiratory therapists. However, none of the employees at the South San Francisco facility have ever done so.

The record reflects that the delivery, patient service, and clinical service technicians substitute for absent warehouse employees. While the warehouse employees cannot substitute for the patient and clinical service technicians because they (warehouse employees) do not possess a class B (commercial) driver's license, they do substitute for the delivery technicians. As indicated above, the transportation leads perform delivery work on a regular basis and also substitute for the delivery technicians, clinical service technicians, patient service technicians and warehouse employees on an as needed basis. They do not substitute for the respiratory therapists. There is no evidence that the respiratory therapists have substituted for any other employees or that any other employees have substituted for the respiratory therapists.

The respiratory therapists, clinical service technicians, patient service technicians and delivery technicians work in the field most of the time making deliveries to patients and usually do not return to the Employer's facility during the workday. At times, they make deliveries and/or do set ups of equipment and follow-up visits to some of the same patients and occasionally, they may have contact with each other while doing so. Clinical service technician Humberto Espinosa testified that in the two years that he has worked for the Employer as a patient service technician and then as a clinical service technician, he has run into a respiratory therapist while visiting a patient on only two occasions. However, Lucero testified that once or twice a week a clinical service technician and an respiratory therapist will work on a joint set up of oxygen equipment for the same patient, and in about 40 to 60% of those cases the clinical service technician and the respiratory therapist are present in the patient's home at the same time. In this regard, Clinical Service Technician Espinosa, testified that he has never assisted an respiratory therapist in setting up equipment at a patient's home and does not know how to set up the equipment that the respiratory therapists set up.

Respiratory therapists have contact with the clinical and patient service technicians at the Employer's facility. Espinosa testified that he sees respiratory therapists about two or three times a month. Clinical and patient service technicians at times consult with the respiratory

therapists about equipment and patients. Espinosa testified that he has sought advice from Lead Respiratory Therapist Janet Melendrez on about four or five occasions in the past two years. Respiratory therapists participate in the monthly in-service meetings attended by the clinical and patient service technicians and the transportation leads and have at times given in-service training to other employees on how to use certain types of equipment such as kangaroo pumps and suction machines. Espinosa testified that occasionally respiratory therapists will ask him to deliver a piece of equipment to a patient when the family already knows how to use it.

Espinosa testified that he frequently interacts with Patient Service Technician Paul Leville concerning deliveries to patients' homes, as Leville and Espinosa service the same geographic area. There is contact between the warehouse employees and other employees because the warehouse employees assist the respiratory therapists, clinical and patient service technicians, and delivery technicians in locating equipment in the warehouse and in loading equipment for delivery to patients.

While the clinical and patient service technicians, respiratory therapists, and transportation leads all work on-call, the respiratory therapists are scheduled separately, as discussed above. Only respiratory therapists can handle on-call problems dealing with ventilators, CPAPs or oximeter equipment. The delivery technicians and warehouse employees do not work on call.

Working Conditions. All of the Employer's employees participate in new employee training. The training for the patient service technicians includes watching a video that shows how to operate oxygen equipment, completing a questionnaire on the contents of the video, and being trained on the job by another employee for a few weeks. On a quarterly basis, the patient and clinical service technicians, delivery technicians, transportation leads and warehouse employees are given training and mini-review examinations. The respiratory therapists do not take these examinations.

Pursuant to Employer policy, the clinical and patient service technicians must also take a test on medical gases every two years in order to be recertified in this area. The record does not indicate whether the respiratory therapists are required to take this test. Respiratory therapists have continuing education requirements under State law that the petitioned-for employees do not have. All employees attend monthly branch meetings and the respiratory therapists sometimes have separate meetings, as do the petitioned-for employees. The patient and clinical service technicians and the delivery technicians are subject to random quarterly drug testing. Lucero testified, however, that no respiratory therapist had ever been drug-tested.

As noted above, the daily scheduling of deliveries and patient visits is handled separately for the logistics department employees and the respiratory therapists. The daily scheduling of visits to patients for the respiratory therapists is handled by the lead respiratory therapist with the input of the branch manager and the delivery scheduling for the logistics department employees is handled by the transportation leads. The logistics employees who make deliveries have staggered schedules, as do the respiratory therapists.

The record reflects that with the exception of the driver incentive bonus program described above, all employees receive the same fringe benefits. All use the same timeclock, lunchroom, bathrooms and parking lot, although as indicated above, the employees making deliveries of equipment or visiting patients in the field seldom return to the Employer's facility during their workday. The respiratory therapists are allowed to visit patients and fill out a timesheet in lieu of clocking in; the clinical and patient service technicians, the delivery technicians, and presumably the transportation leads, must clock in before they make their first deliveries.

The delivery technicians and the clinical and patient service technicians all use the drivers' room at the Employer's facility to fill out paperwork. The respiratory therapists have their own office. It is located about 30 to 40 feet from the driver's room. Patient records are maintained in the respiratory therapists' office. The Employer's facility also contains a locked cage where products regulated by the FDA are stored. The senior warehouse technician, two of the respiratory therapists and Lucero are the only persons who possess the MDR (medical device retailer) licenses issued by the State that authorize them to have access to these products and/or they must be present at the facility in order for other employees to have access to them.

The clinical and patient service technicians, delivery technicians and transportation leads wear uniforms consisting of shirts, pants, and boots or shoes that are provided by the Employer. The respiratory therapists do not wear uniforms. As indicated above, the clinical and patient service technicians and the delivery technicians drive Employer-supplied vehicles, while the respiratory therapists drive their own cars and receive a vehicle allowance and mileage reimbursement from the Employer. While the respiratory therapists use their own cell phones, the delivery technicians, and the clinical and patient service technicians use radios provided by the Employer.

Supervision. As indicated above, at the time of the hearing, the respiratory therapists and the logistics department employees (i.e., clinical and patient service technicians, delivery technicians, transportation leads and warehouse employees) were all supervised by Branch Manager Lucero. However, the record reflects that until Logistics Supervisor Bonillo stepped down from that position in April 2003 to become a clinical service technician, the logistics

employees had separate supervision. The record does not disclose whether or when a new supervisor will be hired to fill Bonillo's position.

Analysis. The only issue presented herein is whether respiratory therapists must be included in the unit. The Employer contends that they must be included and the Petitioner takes the opposite position. As discussed below, I find that the respiratory therapists may properly be excluded from the unit.

The Board has long held that the Act does not require that the bargaining unit approved by the Board be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be *an* appropriate unit. *The Boeing Company*, 337 NLRB No. 24 (December 20, 2001); *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994); *Omni International Hotel*, 283 NLRB 475 (1987); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983); *NLRB v. J. C. Penney Co.*, 620 F.2d 718, 719 (9th Cir. 1980); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951).

The respiratory therapists at issue herein are technical employees. Technical employees are defined as employees who do not meet the strict requirements of the term "professional employees," as defined by the Act, but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools, or through special courses. *Audiovox Communications Corp.*, 323 NLRB 647 (1997); *Folger Coffee Co.*, 250 NLRB 1 (1980); *Barnert Memorial Hospital Center*, 217 NLRB 775, 777 (1975); *Litton Industries of Maryland*, 125 NLRB 722, 724-725 (1959). *Augusta Chemical Co.*, 124 NLRB 1021(1959); *Dayton Aviation Radio & Equipment Corp.*, 124 NLRB 306 (1959).

Respiratory therapists in California must obtain an AA degree in respiratory therapy requiring a two-year program and must pass a State Board examination in order to be certified to practice their profession in the State. Respiratory therapists are authorized to provide respiratory care treatment and diagnostic testing to patients under the prescription of a physician or in emergency situations. Such treatments can include the diagnostic and therapeutic use of medical gases (exclusive of anesthesia); aerosols, humidification; pharmacological agents related to respiratory care procedures; ventilator support; cardiopulmonary resuscitation; insertion (without cutting tissues) and maintenance of artificial airways; collection of blood specimens and specimen from respiratory tract; and analysis of blood gases and respiratory secretions. California Code Chapter 3 Section 3702. Given such licensing requirements and the nature of their work, I find that the respiratory therapists are technical employees, as their work is clearly of a technical nature, involves the use of

independent judgment, and requires the exercise of specialized training usually acquired in colleges, technical schools or through special courses.

The Board decides whether technical employees should be included in a unit with non-technical employees on a case by-case basis, based on a review of such factors as bargaining history; common supervision; similarity of skills and job functions; contacts and/or interchange with other employees; similarity of working conditions; type of industry; location of employees within the plant; the desires of the parties; and whether any union seeks to represent the technical employees in a separate unit. See *Hallandale Rehabilitation and Convalescent Center*, 313 NLRB 835 (1994); *Park Manor Care Center*, 305 NLRB 872 (1991); *Sheffield Corp.*, 134 NLRB 1101 (1962).

In the instant case, there is no history of collective bargaining and no union seeks to represent the respiratory therapists in either a combined or a separate unit. The record reflects that the respiratory therapists have common supervision with the non-technical employees because of the departure of the logistical department supervisor in April 2003. The respiratory therapists share certain job functions with the clinical service technicians, patient service technicians and delivery technicians, in that part of their job is to make deliveries and some of their deliveries are made to the same patients. On the other hand, the respiratory therapists are the only employees required to possess a respiratory therapist license and they are the only employees allowed to set up and monitor certain types of equipment such as ventilators, CPAP machines and oximeters and to provide respiratory care to patients.

The respiratory therapists do not substitute for the clinical and patient service technicians, delivery technicians and/or warehousemen. Nor do any other employees substitute for the respiratory therapists. None of the respiratory therapists at the Employer's facility were formerly employed in the petitioned-for classifications, nor were any of the employees in the other classifications formerly respiratory therapists. While the Employer introduced general testimony that many clinical service technicians have become respiratory therapists at other Employer locations, the only location relevant to this inquiry is the South San Francisco facility, and it is clear from the record that none of the employees at that facility have started in other classifications and trained to become respiratory therapists.

During most of the day, the respiratory therapists are away from the Employer's facility making deliveries, as are the clinical and patient service technicians and the delivery technicians. Thus, the respiratory therapists do not have frequent contact with the petitioned-for employees. In addition, the respiratory therapists and the petitioned-for employees work staggered schedules, which makes it

less likely that, they will come into contact with each other. While the record shows that there are some contacts between the respiratory therapists and employees in the petitioned-for unit, as described above, such contacts are not a regular or frequent occurrence.

In addition to the foregoing, the record also shows that the respiratory therapists earn substantially more than the petitioned-for employees--approximately \$7 to \$11 more per hour. Further, although most of the benefits the respiratory therapists receive are the same as those received by the petitioned-for employees, they (respiratory therapists) are not eligible for the good driving record bonus program given to the clinical and patient service technicians and delivery technicians. Moreover, the respiratory therapists use their personal cars and cell phones in making deliveries and receive a vehicle allowance and mileage reimbursement, while the delivery technicians, clinical and patient service technicians, and transportation leads drive company vehicles and use company radios. Finally, the respiratory therapists are not required to wear uniforms as are the delivery technicians, clinical and patient service technicians and transportation leads.

Based on the respiratory therapists' lack of permanent and temporary interchange with the petitioned-for employees; their substantially higher pay rate; and their different qualifications, skills and job functions, I find that the record does not establish that the respiratory therapists share such a strong community of interest with the petitioned-for employees as to require their inclusion in the unit. Although the respiratory therapists deliver equipment to patients, like the clinical and patient service technicians and the delivery technicians, the work they perform is different from that performed by the petitioned-for employees. Indeed, the record reflects that the petitioned-for employees are not trained and cannot lawfully operate most of the equipment that respiratory therapists set up on a daily basis, such as ventilators, as they are not licensed by the State of California to do so. In addition, while the record reflects that there is contact between the respiratory therapists and the petitioned-for employees, this contact is not so substantial as to compel their inclusion in the unit in light of the other factors discussed above. *Id.* Nor does the degree of functional integration in the Employer's operation warrant such a result, given that the scheduling of appointments for the respiratory therapists is handled by the lead respiratory therapist and is handled separately from the scheduling for other employees; and that respiratory therapists may visit patients before coming to work whereas the petitioned-for logistics employees cannot do so.

In concluding that the respiratory therapists should be excluded from the unit, I have carefully considered the arguments raised by the Employer and do not find them to be persuasive. The Employer's arguments regarding the existence of

extensive contact and functional integration have been considered and rejected as not being controlling in this case for the above reasons. Nor are the cases cited by the Employer involving other Employer facilities or facilities of the Employer's predecessors at other locations controlling herein. Thus, in the Decision and Direction in *Apria Health Care*, Case 19-RC-13146 (formerly 21-RC-19575), dated December 14, 1995, the union removed its objection to the inclusion of the respiratory therapists in the unit and no issue was even raised for the Regional Director to decide in this regard. Similarly, the Employer's reliance on the Decision and Direction of Election in *Abbey/Foster Medical Group*, Case 36-RC-5148, June 14, 1999, is misplaced because the union and the employer in that case agreed to include respiratory therapists in the unit.

In the Decision and Direction of Election in *Abbey Medical, Inc. d/b/a Abbey Home Health Care*, Case No. 8-RC-14683, relied on by the Employer, the Regional Director included respiratory therapists in a unit with patient service technicians, warehouse technicians, customer service representatives and order/accounts processors employed at the employer's Brooklyn, Heights, Ohio facility. However, in that case, the Regional Director relied on the evidence that fifty percent of the deliveries made by the respiratory therapists involved the same type of equipment as that carried by the patient service technicians, thus making their duties "nearly indistinguishable" from that of the patient service technicians for a "substantial period of their working time." Similar evidence was not presented in the instant case. Further, the order filling process in *Abbey Home Health Care* was far more integrated than that in the instant case. Thus, in *Abbey*, the process was centralized, whereas in the instant case, the respiratory therapists handle their own scheduling for the delivery of orders. In addition, in *Abbey*, the record did not disclose the substantial difference in the wages between the respiratory therapists and other employees that exists in the instant case. Nor did it involve a difference in the benefits that exists in the present case with regard to the logistics employees being eligible for a drivers incentive bonus program for which the respiratory therapists are ineligible. Further, it did not include evidence that the respiratory therapists had a separate office from the logistics employees. Finally, unlike the instant case, *Abbey* did not involve a situation where common supervision was attributable to the fact that the supervisor of the logistics employees had recently stepped down from that position.

In sum, the record supports that the petitioned-for employees share a substantial community of interest without the inclusion of the respiratory therapists. Thus, the record establishes that the delivery technicians, clinical and patient service technicians, and transportation leads all make deliveries to patients using Employer vehicles and they have permanent and temporary interchange with one another as well as regular contact. The warehouse employees substitute for the delivery technicians and have regular contact with the

petitioned-for employees. All of the petitioned-for employees have historically had the same supervision. The wage rates of petitioned-for employees differ by a maximum of \$4 an hour and they have similar fringe benefits. Based on all the evidence, I find that they constitute an appropriate unit for collective bargaining purposes. Accordingly, an election is hereby directed in the petitioned-for unit, modified to enumerate the specific employee classifications sought by the Petitioner.

7/ I deny Petitioner's request to have its name appear on the ballot as Teamsters Local 350.

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